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Mazlan bin Osman v Public Prosecutor

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HIGH COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 42A-16 OF 2010
SU GEOK YIAM J
3 NOVEMBER 2011

C

Criminal Law — Corruption — Corruptly receiving gratification — Police officer charged with offences of corruptly asking and receiving gratification — Whether prima facie case established — Whether presumption in s 42 of the Anti-Corruption Act 1997 rebutted — Anti-Corruption Act 1997 ss 10(a)(bb), 11(a) & 42

D

Criminal Procedure — Appeal — Conviction, against — Accused charged with offences of corruptly asking and receiving gratification — Whether complainant's husband an accomplice or trap witness — Whether sworn oral testimony of the complainant's husband sufficiently corroborated by inhesrasdependent evidence — Whether failure of trial judge to warn himself of danger of convicting without corroboration would render convictions bad — Whether trial judge erred in admitting tape recording of telephone conversation between appellant and complainant's husband — Whether prima facie case established — Whether trial judge failed to adequately consider the defence — Whether presumption in s 42 of the Anti-Corruption Act 1997 rebutted — Anti-Corruption Act 1997 ss 10(a)(bb), 11(a) & 42

E

F

Criminal Procedure — Appeal — Sentence, against — Appellate court slow to interfere with sentence unless it is manifestly wrong — Whether sentence illegal or unsuitable — Corruption — Whether correct principles applied in assessment of sentence

G

PW12 lodged a police report (P6) against one Jia Jia, for sending a message to her which contained a threat to kill her and to abduct her husband, Lai Kar Foo ('PW6'). Jia Jia was PW6's girlfriend. Corporal Aishah ('PW3') took the report and duly informed the appellant who was the investigating officer on duty at the material time. The appellant instructed PW3 to classify the report as 'RTM'. Several days later, the appellant through phone asked PW6 to meet up with him. During this meeting, the appellant showed the report to PW6. The appellant also informed PW6 that PW6 had another case which was pending in the court. PW6 asked whether the report could be withdrawn. The appellant told PW6 that the report could not be withdrawn and asked PW6 for money. The appellant initially asked for RM20,000 but reduced it to RM3,000 and then to RM1,600. PW6 then lodged a report with the Anti-Corruption

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I

Agency ('ACA'). The ACA then planned a trap. A phone conversation between the appellant and PW6 was then tape recorded. During this phone conversation PW6 informed the appellant that he could only afford to pay RM1,200. The appellant asked him to bring the money to the Cheras Police District Headquarters. The ACA then handed over marked money to PW6. The pre-arranged signal was for PW6 to pull his shirt out from his trousers upon handing over the marked money to the appellant. When PW6 met the appellant, PW6 asked the appellant whether his case could be closed. The appellant said 'boleh'. The appellant then asked PW6 for the money. PW6 then handed over the marked money to the appellant. The appellant took the marked money and placed it inside his pocket. The appellant then asked PW6 for the balance of the RM400. PW6 asked the appellant for time to pay the balance. PW6 pulled his shirt out of the waistband of his trousers and walked out of the police station. PW1, an ACA officer then introduced himself to the appellant. The appellant pleaded with PW1 to help him. The appellant also said that he did not ask for the money and that he merely wished to help PW6. The appellant then took out the money from his right trousers' pocket and handed it over to PW1. The appellant was arrested and charged with two counts of corruption under the Anti-Corruption Act 1997 (Act 575) ('the Act'). The first count was under s 10(a)(bb) of the Act and the second count was under s 11(a) of the Act. The learned trial judge found the appellant guilty, convicted him and sentenced him to the minimum 14 days imprisonment and a fine of RM10,000 for each offence. The appellant appealed against this decision on the following grounds: (i) that the trial judge failed to adequately warn himself of the danger of convicting on the uncorroborated evidence of the complainant; (ii) the trial judge failed to consider that there was no corroboration of the sworn oral testimony of PW6; (iii) that the trial judge erred in admitting the tape recording of the telephone conversation; (iv) that the trial judge misdirected himself in holding that there was a prima facie case; and (v) that the trial judge failed to adequately consider the defence of the appellant.

Held, dismissing the appeal and confirming the convictions and sentences:

(1) In respect of the first count, the complainant, PW6, was neither an accomplice nor a trap witness. He was not the active party. He merely played a passive role. He did not offer a bribe to the appellant to induce the appellant to close the case. He did not know about the case until it was brought to his knowledge by the appellant (see para 83(a)(i)).

(2) In respect of the second count PW6 was an agent provocateur rather than an accomplice because prior to the commission of the offence by the appellant he was acting as the agent for the ACA to set a trap for the appellant when he handed over the marked money to the appellant; *Lionel De Silva v Reg* [1956] MLJ 203; *Pendakwa Raya lwn Zakaria bin*

Mansor [1996] 1 LNS 107 referred; *Rattan Singh v Public Prosecutor* [1971] 1 MLJ 162 distinguished (see para 83(a)(vii)–(viii)).

(3) There was corroboration of PW6's testimony in the form of independent evidence of some material fact which implicated the appellant and tended to confirm that he was guilty in the recovery of the marked money from the body of the appellant who took it out from his trousers' pocket based on the testimonies of PW1 and PW10, the two ACA officers. The evidence of PW6 was also corroborated by independent evidence adduced by PW12 (see para 83(a)(xvi)–(xviii)).

(4) So there was no necessity for the learned trial judge to warn himself of the danger of convicting the appellant without corroboration. Even assuming that there was no corroboration of PW6's evidence, by virtue of s 44(2) of the Act the failure or omission of the learned trial judge to warn himself of the danger of convicting the appellant on both counts without any corroboration of PW6's evidence will not render the convictions illegal or bad if the evidence of PW6 was credible and there was sufficient evidence to prove every ingredient of the charge (see para 83(a)(xxii)–(xxiii)).

(5) The learned trial judge acted correctly in admitting the tape recording, P10, of the telephone conversation between PW6 and the appellant and the transcript, as PW8 had complied substantially with the accepted procedure before, during and after the recording; *Mohd Ali Jaafar v Public Prosecutor* [1998] 4 MLJ 210 referred (see para 83(c)).

(6) Based on the overwhelming evidence as adduced by the prosecution's 14 witnesses the learned trial judge was correct in ruling that the prosecution had proved a prima facie case at the close of the prosecution case against the appellant in respect of both counts (see para 83(d)(i)).

(7) The explanation of the appellant was not consistent with his innocence. It was also not plausible, inherently probable or likely and it was inherently incredible. If he had not done anything wrong he would not have pleaded with PW1 to help him when PW1 confronted him after PW6 had handed over the marked money to him (see para 83(e)(ix)).

(8) The prosecution had proved the two counts against the appellant beyond reasonable doubt as the appellant did not succeed in rebutting the presumption as contained in s 42 of the Act on the balance of probabilities that he had solicited the gratification of RM1,600 corruptly and that he had also received the gratification of RM1,200 corruptly; *Public Prosecutor v Yuvaraj* [1969] 2 MLJ 89 referred (see para 83(e)(xii)).

(9) Although the sentences were on the lenient side, nevertheless, it is an established principle of law that an appellate court should be slow to interfere with or disturb a sentence passed by the court below unless it is

manifestly wrong in the sense of being illegal or of being unsuitable to the proved facts and circumstances of the case. Since the learned trial judge had applied the correct principles in the assessment of sentence there was no reason for the court to interfere by passing a different sentence; *Public Prosecutor v Mohamed Nor & Ors* [1985] 2 MLJ 200 referred (see paras 85–86).

[Bahasa Malaysia summary

PW12 telah membuat laporan polis (P6) terhadap Jia Jia, kerana menghantar pesanan kepadanya yang mengandungi ugutan untuk membunuhnya dan untuk menculik suaminya, Lai Kar Foo ('PW6'). Jia Jia adalah teman wanita PW6. Korporal Aishah ('PW3') telah mengambil laporan itu dan memaklumkan perayu yang merupakan pegawai penyiasat yang bertugas pada masa matan. Perayu mengarahkan PW3 mengklasifikasikan laporan itu sebagai 'RTM'. Beberapa hari kemudian, perayu melalui telefon meminta PW6 berjumpa dengannya. Dalam perjumpaan itu, perayu telah menunjukkan laporan itu kepada PW6. Perayu juga memaklumkan PW6 bahawa PW6 mempunyai satu lagi kes yang belum selesai di mahkamah. PW6 bertanya sama ada laporan itu boleh ditarik balik. Perayu memberitahu PW6 bahawa laporan itu tidak boleh ditarik balik dan meminta wang daripada PW6. Perayu pada mulanya meminta RM20,000 tetapi mengurangkannya kepada RM3,000 dan kemudian RM1,600. PW6 kemudian telah membuat laporan dengan Agensi Pencegah Rasuah ('APR'). APR kemudian merancang perangkap. Percakapan telefon antara perayu dan PW6 kemudian telah direkodkan. Semasa percakapan telefon ini PW6 memberitahu perayu bahawa dia hanya mampu membayar RM1,200. Perayu memintanya untuk membawa wang itu ke ibu pejabat polis daerah. ACA kemudian menyerahkan wang bertanda kepada PW6. Isyarat yang diatur sebelumnya adalah di mana PW6 mengeluarkan kemejanya daripada seluar setelah menyerahkan wang bertanda itu kepada perayu. Apabila PW6 berjumpa perayu, PW6 bertanya kepada perayu sama ada kesnya boleh ditutup. Perayu berkata 'boleh'. Perayu kemudian meminta PW6 untuk wang itu. PW6 kemudian menyerahkan wang bertanda itu kepada perayu. Perayu telah mengambil wang bertanda itu dan meletakkannya dalam poketnya. Perayu kemudian meminta daripada PW6 untuk baki RM400 itu. PW6 meminta masa daripada perayu untuk membayar baki tersebut. PW6 mengeluarkan kemejanya daripada ikatan pinggang seluarnya dan keluar daripada balai polis itu. PW1, pegawai ACA kemudian telah memperkenalkan dirinya kepada perayu. Perayu merayu kepada PW1 untuk membantunya. Perayu juga mengatakan bahawa dia tidak meminta wang itu dan bahawa dia hanya berniat untuk membantu PW6. Perayu telah ditangkap dan dituduh atas dua pertuduhan rasuah di bawah Akta Badan Pencegah Rasuah 1997 (Akta 575) ('Akta tersebut'). Pertuduhan pertama adalah di bawah s 10(a)(bb) Akta tersebut dan pertuduhan kedua adalah di bawah s 11(a) Akta tersebut. Hakim perbicaraan yang bijaksana mendapati perayu bersalah, mensabitkan dan menghukumnya penjara untuk minimum 14 hari dan denda RM10,000

untuk setiap kesalahan. Perayu telah merayu terhadap keputusan ini atas alasan-alasan berikut: (i) bahawa hakim perbicaraan telah gagal untuk mengingatkan dirinya sewajarnya tentang akibat membuat sabitan berdasarkan keterangan pengadu yang tidak disokong; (ii) hakim perbicaraan telah gagal mempertimbangkan bahawa tiada sokongan untuk testimoni lisan bersumpah PW6; (iii) bahawa hakim perbicaraan terkhilaf dalam menerima pita rakaman percakapan telefon PW6; (iii) bahawa hakim perbicaraan telah salah arah dalam memutuskan bahawa terdapat kes prima facie; dan (v) bahawa hakim perbicaraan telah gagal mempertimbangkan sewajarnya pembelaan perayu.

Diputuskan, menolak rayuan dan mengesahkan sabitan-sabitan dan hukuman-hukuman:

(1) Berhubung pertuduhan pertama, pengadu, PW6, bukan rakan sejenayah ataupun saksi perangkap. Dia bukan pihak yang aktif. Dia hanya memainkan peranan pasif. Dia tidak menawarkan suapan kepada perayu untuk mempengaruhi perayu menutup kesnya. Dia tidak mengetahui tentang kes itu sehingga ia dibawa kepada pengetahuannya oleh perayu (lihat perenggan 83(a)(i)).

(2) Berhubung pertuduhan kedua PW6 adalah ejen provokasi dan bukan rakan sejenayah kerana sebelum kesalahan dilakukan oleh perayu dia bertindak sebagai ejen untuk ACA untuk membuat perangkap untuk perayu apabila dia menyerahkan wang bertanda itu kepada perayu; *Lionel De Silva v Reg* [1956] MLJ 203; *Pendakwa Raya lwn Zakaria bin Mansor* [1996] 1 LNS 107 dirujuk; *Rattan Singh v Public Prosecutor* [1971] 1 MLJ 162 dibeza (lihat perenggan 83(a)(vii)–(viii)).

(3) Terdapat sokongan untuk testimoni PW6 dalam bentuk keterangan yang berasingan berhubung beberapa fakta penting yang membabitkan perayu dan bertujuan untuk mengesahkan bahawa dia bersalah dalam mendapat balik wang bertanda itu daripada badan perayu yang mengeluarkannya daripada poket seluarnya berdasarkan testimoni PW1 dan PW10, dua pegawai ACA. Keterangan PW6 juga disokong oleh keterangan berasingan yang dikemukakan oleh PW12 (lihat perenggan 83(a)(xvi)–(xviii)).

(4) Tiada keperluan untuk hakim perbicaraan yang bijaksana untuk mengingatkan dirinya tentang akibat mensabitkan perayu tanpa sokongan. Walaupun berandaian bahawa tiada sokongan untuk keterangan PW6, menurut s 44(2) Akta tersebut kegagalan atau peninggalan hakim perbicaraan yang bijaksana untuk mengingatkan dirinya tentang akibat mensabitkan perayu atas dua pertuduhan tanpa apa-apa sokongan untuk keterangan PW6 tidak akan menyebabkan sabitan-sabitan tersebut menyalahi undang-undang atau salah jika

keterangan PW6 boleh dipercayai dan terdapat keterangan mencukupi untuk membuktikan setiap elemen pertuduhan (lihat perenggan 83(a)(xxii)–(xxiii)).

(5) Hakim perbicaraan yang bijaksana bertindak dengan betul dalam menerima pita rakaman itu, P10, berhubung percakapan telefon antara PW6 dan perayu dan transkrip itu, kerana PW8 telah mematuhi dengan prosedur yang diterima sebelum, semasa dan selepas rakaman itu; *Mohd Ali Jaafar v Public Prosecutor* [1998] 4 MLJ 210 dirujuk (lihat perenggan 83(c)).

(6) Berdasarkan banyak keterangan dikemukakan oleh 14 saksi pendakwaan maka hakim perbicaraan yang bijaksana adalah betul untuk memutuskan bahawa pendakwaan telah membuktikan kes prima facie di penutup kes pendakwaan terhadap perayu berkaitan dua pertuduhan itu (lihat perenggan 83(d)(i)).

(7) Penjelasan perayu tidak konsisten dengan kejujurannya. Ia juga tidak munasabah, berkebarangkalian atau berkemungkinan dan tidak wajar. Jika dia tidak berbuat apa-apa salah dia tidak mungkin merayu dengan PW1 untuk menolongnya apabila PW1 bersemuka dengannya setelah PW6 menyerahkan wang bertanda kepadanya (lihat perenggan 83(e)(ix)).

(8) Pendakwaan telah membuktikan dua pertuduhan terhadap perayu melampaui keraguan munasabah kerana perayu tidak berjaya mematahkan andaian seperti mana terkandung dalam s 42 Akta tersebut atas imbangan kebarangkalian bahawa dia mendapat suapan sejumlah RM1,600 itu secara rasuah dan bahawa dia juga telah menerima suapan sejumlah RM1,200 secara rasuah; *Public Prosecutor v Yuvaraj* [1969] 2 MLJ 89 dirujuk (lihat perenggan 83(e)(xii)).

(9) Walaupun hukuman-hukuman bersifat ringan, adalah prinsip undang-undang bahawa mahkamah rayuan tidak patut campur tangan atau mengganggu hukuman yang dijatuhkan oleh mahkamah bawahan kecuali ia adalah salah sehingga menyalahi undang-undang atau tidak sesuai untuk membuktikan fakta dan keadaan kes itu. Oleh sebab hakim perbicaraan yang bijaksana telah mengguna pakai prinsip-prinsip yang betul dalam penilaian hukuman itu maka tiada sebab untuk mahkamah campur tangan dengan menjatuhkan hukuman lain; *Public Prosecutor v Mohamed Nor & Ors* [1985] 2 MLJ 2009 dirujuk (lihat perenggan 85–86).]

Notes

For cases on conviction, against, see 5(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 332–382.

A For cases on corruptly receiving gratification, see 4 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 138–150.

For cases on sentence, against, see 5(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 755–791.

B **Cases referred to**

Ah Mee v PP [1967] 1 MLJ 220; [1967] 1 LNS 3, FC (refd)

Hamidon bin Mat Yatim v PP [1995] MLJU 112; [1995] 3 CLJ 724, HC (refd)

Lee Ah Seng v PP [2007] 6 MLJ 1; [2007] 5 CLJ 1, FC (refd)

C *Lee Kwai Heong & Anor v PP* [2006] 2 MLJ 528 (refd)

Lionel De Silva v Reg [1956] MLJ 203; [1956] 1 LNS 61 (refd)

Mohamed Ali v PP [1962] MLJ 230; [1962] 1 LNS 99 (refd)

Mohd Ali Jaafar v PP [1998] 4 MLJ 210; [1998] 4 CLJ Supp 208, HC (refd)

D *Mohd Sallehuddin bin Mohd Yusof v Pendakwa Raya* [2003] 1 LNS 687, HC (distd)

Ng Kok Lian & Anor v PP [1983] 2 MLJ 379; [1983] CLJ (Rep) 293, FC (distd)

E *Pendakwa Raya lwn Zakaria bin Mansor* [1996] 1 LNS 107, HC (refd)

Public Prosecutor lwn Rahiman b Selamat & Md Razib b Othman (Rayuan Jenayah No 42A-21 Tahun 2001) (refd)

PP v Dato' Waad Mansor [2005] 2 MLJ 101; [2005] 1 CLJ 421, FC (refd)

PP v Francis Philip Nunis [1982] CLJ (Rep) 648, HC (refd)

F *PP v Loo Choon Fatt* [1976] 2 MLJ 256 (refd)

PP v Mohamed Fathi bin Haji Ahmad [1979] 2 MLJ 75 (refd)

PP v Mohamed Nor & Ors [1985] 2 MLJ 200, SC (refd)

PP v Yuvaraj [1969] 2 MLJ 89, PC (refd)

G *R v Mullins* 3 Cox CC 526 (refd)

Ramli Sutu v PP [1998] 5 CLJ 671, HC (refd)

Rattan Singh v PP [1971] 1 MLJ 162; [1970] 1 LNS 132 (distd)

Thavanathan a/l Balasubramaniam v PP [1997] 2 MLJ 401, SC (refd)

H **Legislation referred to**

Anti-Corruption Act 1997 ss 10(a)(bb), 11(a), 16, 42, 44, 44(1), (1)(b), 45

Evidence Act 1950 s 157

Prevention of Corruption Act 1961 (Repealed by the Anti-Corruption Act 1997) ss 17, 18

I

Abd Shukor bin Tokachil (Shukor & Associates) for the appellant.

Fadzillah bt Mohd Ossman (Deputy Public Prosecutor, Malaysian Anti-Corruption Commission) for the respondent.

Su Geok Yiam J:

BACKGROUND

[1] On 24 June 2006, at 1.25pm, PW12, Elam a/p Endin Kua, a Thai national, lodged a police report (the 'report'), P6, at the Sg Besi police station against one Jia Jia, for sending a message to her which contained a threat to kill her, to abduct her husband, Lai Kar Foo, PW6, and to take PW6 to China if PW6 did not go to see Jia Jia. Jia Jia is PW6's girlfriend. She is a Chinese national.

[2] PW12 had lodged the report because she was afraid that Jia Jia would implement her threat to kill her. She was also worried that she would lose the bail amount which she had raised in order to stand as surety for PW6 in connection with a pending case in the magistrate's court in the event Jia Jia took PW6 with her to China as PW6 had informed her that he had obtained a new passport and that he wished to go to China.

[3] PW3, Corporal Aishah bt Hj Saironi, took down her report. She duly informed her superior, C/Insp Zuraimani, the officer in charge of the police station about PW12's report. PW3 also informed the investigating officer (the 'IO'), who was on duty at the material time, C/Insp Mazlan bin Osman ('C/Insp Mazlan'), about the report by telephone. Upon reading out the report to C/Insp Mazlan over the telephone the latter instructed her to classify the report as 'RTM' and to inform PW12 to refer her complaint to the magistrate's court ('RTM').

[4] PW3 then contacted PW12 on the telephone. She gave C/Insp Mazlan's telephone number to PW12 and she asked PW12 to call him.

[5] PW3 identified the appellant in court as the IO, C/Insp Mazlan. On 26 June 2006, PW12 called the appellant to ask him for his assistance concerning Jia Jia's message containing the threat. He said he would call PW12. But he did not call her. So she called him the following day on 27 June 2006.

[6] She told the appellant that she was afraid of her husband. She said she was afraid that her husband would look for her in her house and harass her for lodging the report. She informed the appellant that she had lodged the report because she was afraid of Jia Jia. She gave her husband's telephone number to the appellant. She testified that she did not tell her husband that she wished to withdraw her report against Jia Jia.

[7] PW13, ASP Baharudin bin Mustapha, who was the appellant's superior

officer at the material time, being the senior investigating officer (the 'SIO') explained that it was the appellant's duty to classify the report. In order to do that the appellant had to refer the report to him. But the appellant did not refer the report to him.

[8] He also explained that 'RTM' means 'refer to magistrate' and that cases involving marital misunderstandings are usually classified as 'RTM' and the police would issue a form known as Polis 41A to the person lodging the report concerned to refer the complaint to the magistrate. The magistrate will decide on the appropriate course of action to take against the other party. If the magistrate directs the police to conduct investigations into the report concerned, the police will open up an investigating paper ('IP') and investigate the report concerned.

[9] According to PW13, in view of the alleged threat made on PW12's life as mentioned in the report, it was necessary for the appellant to open up an IP. He stressed that the appellant could not classify the report as 'RTM' without first informing him or another SIO, namely, ASP Nazri, who was also on duty at the material time.

[10] PW13 also explained that a statement had to be recorded from PW12 in order to ascertain whether PW12's complaint was substantially about the threat to her life or about the marital misunderstandings between PW12 being PW6's wife on the one side and Jia Jia being PW6's girlfriend on the other side. Only after it has been ascertained that it was the latter could the report be classified as 'RTM'. He further explained that PW12 was the only person who could withdraw the report, since the report was lodged by PW12, and her husband could not withdraw the report.

[11] PW5, DSP Tan Ah Chua, was the Head of the Cheras Criminal Investigation Department at the material time. He was responsible for all criminal investigations and also for the day to day administration of the Cheras Police District Headquarters. Based on the duty roster issued by his office, he said that on 24 June 2006 the SIO who was on duty was ASP Nasri and the two IOs who were on duty for Team A were Insp Faizal and the appellant.

[12] He explained in detail the procedure which must be followed after a police report has been lodged. Firstly, every police report lodged had to be referred to the officer in charge of the police station who will then direct it to be referred to the IO who is on duty. Secondly, the IO has no discretion to classify it as RTM on his own. Thirdly, upon scrutinising it the IO must refer it to the SIO.

[13] Fourthly, if the SIO decides that it relates to a minor case the SIO will

direct that it be RTM and the police will not carry out any investigation. Fifthly, the decision of the SIO is final. Sixthly, the IO must abide by the decision of the SIO. Seventhly, the complainant will be given a choice whether to initiate civil proceedings against the person concerned or to file a criminal proceeding against the person concerned.

[14] Finally, if the complainant chooses the first option a form ie Polis 41A will be issued to the complainant to enable the complainant to submit it to the magistrate for further action.

[15] The IO has no discretion to classify a report as 'RTM' without first referring the report to the SIO to get the latter's approval.

THE APPELLANT'S REQUEST FOR MONEY FROM PW6

[16] According to PW6, in his examination-in-chief, he was working as a real estate agent in the year 2006. In the last week of June 2006 he had a case in court involving a woman. One afternoon a person called his mobile phone and introduced himself as Ben. PW6 told the caller he did not know Mr Ben (in his re-examination PW6 has clarified that he had made a mistake and that what transpired was that the caller was looking for Mr Ben, he himself was Mr Ben and the caller was not Mr Ben).

[17] The caller then identified himself as a police officer and said he wished to meet up with PW6.

[18] PW6 asked him what the matter was about. The person told him it concerned a police report. He then asked PW6 when PW6 will be free to meet up with him.

[19] PW6 replied that he could meet up with the caller the next day.

[20] Subsequent to the call, PW6 called the caller back using PW6's mobile phone bearing the No 017–3487938. The caller informed PW6 that his name is Mazlan. PW6 has identified the caller as the appellant.

[21] The appellant asked PW6 to meet up with him in the appellant's office at the Cheras Police District Headquarters.

[22] On the morning of the following day, 7 July 2006, PW6 proceeded to the Cheras Police Station to meet the appellant in the appellant's office with two of his friends, namely, one Encik Hashim and one Lim Poh Sang ('LPS'). He identified PW7, Nor Hashim bin Jaafar, as Encik Hashim. LPS was not

called as a prosecution's witness. At the close of the prosecution's case he was offered to the appellant in the event the appellant was ordered to make his defence.

[23] Upon arriving at the Cheras Police Station PW6 entered the appellant's office whilst his two friends sat at a table outside and waited for PW6. The table was within the compound of the police station. The table was near to the car park.

[24] The appellant showed the report to PW6. PW6 saw that the report was lodged by his wife, PW12. He identified P6 as the report. He asked the appellant whether he could withdraw the report. He took out his identity card ('IC') and handed it over to the appellant. The appellant checked the particulars in PW6's IC and wrote down PW6's name, IC no and PW6's mobile phone No 017–3487938 on the report itself. The appellant then informed PW6 that PW6 had a case which was pending in the court.

[25] PW6 told the appellant that he would telephone his wife, PW12, and ask PW12 to withdraw the report. But the appellant told PW6 that the report could not be withdrawn. The appellant then asked PW6 for money. The appellant initially asked for RM20,000 but reduced it to RM3,000 when PW6 told him he did not have that amount of money. When PW6 informed the appellant that he also did not have RM3,000 and that he would need to borrow the money from his friend the appellant reduced the amount to RM1,600.

[26] The appellant told PW6 that the RM1,600 had to be handed over to him that very day itself so that he could close the matter concerning the report lodged by PW6's wife against his girlfriend.

[27] PW6 pleaded with the appellant to give him a bit of time to raise the money. But the appellant told PW6 that if PW6 did not pay the money to him, the appellant would issue a warrant for the arrest of PW6's girlfriend.

[28] After PW6 came out from the appellant's room he told his two friends, PW7 and LPS, within the compound of the police station that the appellant had asked him for money. According to PW6 he then tried to borrow the money from his two friends. But his friends informed him that they did not have money. So they told him to lodge a report with the Anti-Corruption Agency (the 'ACA').

[29] However, according to PW7, after PW6 came out from the appellant's room PW6 told him he needed a sum of money ie RM3,000. PW7 asked him for what purpose. PW6 replied that he needed the money to settle a case. PW6 then asked PW7 how to look for the money.

THE LODGING OF THE REPORT BY PW6 AT THE ACA

[30] According to PW7 all three of them then got into the car. As the car was being driven out of the police station PW6 suggested lodging a report with the ACA. PW7 told PW6 it was up to him to do so. PW7 also told PW6 that since he had to meet someone at KL Sentral, PW6 could go ahead to the office of the ACA in the Federal Territory to lodge the report whilst he would proceed to KL Sentral. But PW6 informed him that he (PW6) did not know anyone in the ACA.

[31] According to PW7 all three of them then went straight to the office of the ACA. On their arrival, LPS waited downstairs with PW6 whilst PW7 went upstairs to the ACA's office. PW6 asked PW7 to meet with the ACA officer first because he did not know how to go about lodging a report with the ACA.

[32] According to PW6, upon their arrival LPS waited downstairs whilst he and PW7 went upstairs. Since he did not know how to lodge a report he asked PW7 to go inside the office of the ACA first to enquire from the ACA officer how to do that.

[33] According to PW7, he entered the office of the ACA first. He met with an ACA officer. He identified PW1, Nor Razid bin Mohd Aripin, as the ACA officer. He explained to PW1 that PW6 wished to lodge a report.

[34] He then called out to PW6 to go upstairs to meet with PW1.

[35] According to PW6, PW7 then came out of the office of the ACA and asked him to go inside to lodge his report.

[36] PW6 then entered the office of the ACA and met with PW1. PW6 informed PW1 that the police asked him for money and PW6 asked the ACA to arrest the police. PW6 was taken to a room and questioned. PW6 then lodged a report. He identified P1 as the report lodged by him. In his report PW6 narrated the events which had transpired between him and the appellant.

[37] He was then told to see one Tuan Tarmize. He identified PW11, Mohd Tarmize bin Abdul Manaf, as Tuan Tarmize.

[38] PW6 also narrated to PW11 the recent incident which had happened to him. He was then told to wait outside whilst PW11 briefed his men inside the room. After the briefing PW6 was asked to go back into the room.

A THE TAPE RECORDING OF THE PHONE CONVERSATION BETWEEN THE APPELLANT AND PW6

[39] Inside the room, one of the ACA officers took his mobile phone with the No 017–3487938 and attached a microphone to it. He identified PW8, Muhammad Yahya bin Mohd Rashid, as the ACA officer concerned.

[40] According to PW8 he then tested PW6's mobile phone with another phone. After PW8 was satisfied that the microphone was working well PW6 was instructed to telephone the appellant.

[41] PW8 used a tape recorder with size 'AAA' batteries, three blank tapes and a microphone. He also explained briefly to PW6 the manner in which the recording of PW6's telephone conversation with the target will be carried out by him. PW6 informed him that the target was Tuan Mazlan.

[42] PW8 then connected a wire with a microphone to PW6's mobile phone and the tape recorder. PW8 then pressed the record button. This was followed by PW8 saying the opening words for the recording ie his name, PW6's name, PW6's IC No, the name of the appellant, the report number, the date and the time. He then handed over the mobile phone to PW6.

[43] Using his mobile phone to which was attached the microphone, PW6 pressed the mobile phone no of the appellant. When the appellant answered the call PW6 spoke to the appellant in Bahasa Malaysia for about two minutes. PW6 informed the appellant that he could only afford to pay RM1,200. The appellant asked him to bring the money to the appellant at the Cheras Police District Headquarters.

[44] PW6 then ended the call. He switched off his mobile phone and handed over the microphone to PW8.

[45] According to PW8, he then said the closing words for the recording ie his name, PW6's name, PW6's IC No, PW6's mobile phone number, the appellant's name, the appellant's mobile phone number, the date and the time the recording ended.

[46] PW8 then took out the tape from the tape recorder and broke the security pin. He then marked the micro cassette. He then wrote on it '40/2006' being the title of the micro cassette. He also wrote 'MY' in the middle blank portion of the tape. At the top left hand corner he wrote the time of the recording ie 5.32pm.

[47] PW8 then placed the tape back into the tape recorder and he played back the tape and he confirmed his voice, PW6's voice and the appellant's voice. PW6 was seated in front of PW8 when PW8 played back the tape recording and confirmed the voices of the three persons in the tape recording.

[48] PW8 then took out the tape from the tape recorder and kept it inside a steel cabinet in his room which he secured with an iron bar. He alone held the key to his room. He then handed PW6 over to PW1. PW8 also informed PW1 that there was a request for a RM1,200 bribe inside the police station.

THE SETTING OF THE TRAP FOR THE APPELLANT BY THE ACA

[49] According to PW6 after PW8 had recorded the telephone conversation between him and the appellant, PW6 went into another room. In that room PW6 received RM1,200 in cash in marked notes (the 'marked money') from an ACA officer, PW4, Umi Kalusom bt Ahmad.

[50] PW6 counted the money and he compared the serial numbers of the money and found that they corresponded with the numbers in a form. He signed on the form in acknowledgement of his receipt of the money. He identified P2 as the marked money which he had received from PW4. He also identified P3 as the form which he had signed. He further identified his signature in P3.

[51] According to PW4, he had prepared the form, P3. She had also handed over the marked money of RM1,200 to PW6. She saw PW6 signing on the form. She herself also signed on the form, P3. She identified her signature on the form, P3. She then instructed PW8 to record the telephone conversation between PW6 and the appellant.

[52] PW6 was instructed to hand over the marked money to the appellant. Upon doing that he was instructed to send a pre-arranged signal to inform anyone of the three ACA officers who comprised the ambush party. They were PW1, PW10 and one Mohd Akhsan.

[53] The pre-arranged signal was for PW6 to pull his shirt out from his trousers upon handing over the marked money to the appellant. PW6 was also instructed to leave the Cheras Police Station after that and once he was outside the compound of the police station he had to make a phone call to anyone of the three ACA officers.

[54] PW6 took the marked money and placed it in his right trousers' pocket. He then proceeded to the Cheras Police Station with PW7 and LPS.

[55] The three ACA officers, namely, PW1, PW10 and Mohd Akhsan who were instructed to arrest the appellant after PW6 had handed over the marked money to the appellant proceeded to the Cheras Police Station separately.

PW6 HANDS OVER THE MARKED MONEY TO THE APPELLANT

[56] Before arriving at the Cheras Police Station PW6 called the appellant to inform the latter that he was on his way to the Cheras Police Station to meet with him. The appellant informed PW6 that he was not in his office. He asked PW6 to meet him in the coffee shop near the police station.

[57] But when PW6 arrived at the coffee shop PW6 did not see the appellant. So he called the appellant again. Subsequently, he saw the appellant standing at a small door at the police station near the coffee shop. When the appellant saw PW6 the appellant asked PW6 to go slightly inside the small door. PW6 did that and he asked the appellant whether his case could be closed. The appellant said 'Boleh' in Malay which means 'Yes' in English.

[58] The appellant then asked PW6 where was the money which he had agreed to give to the appellant. PW6 then took out the marked money from his trousers' pocket and handed it over to the appellant. The appellant took the marked money and placed it inside his pocket. The appellant then asked PW6 for the balance of the RM400. PW6 asked the appellant for time to pay the balance of RM400. PW6 then pulled his shirt out of the waistband of his trousers and walked out of the police station.

[59] Upon crossing the road he called the ACA officer, PW1, to inform him that he had handed over the marked money to the appellant. PW1 instructed him to return to PW1's office.

[60] The tape recording of his mobile phone conversation with the appellant, P10, was played in the lower court during the trial and PW6 identified P10 as the tape recording of his telephone conversation with the appellant. He identified his own voice.

RECOVERY OF THE MARKED MONEY FROM THE APPELLANT

[61] PW10, Mohd Khairi bin Ali Nordin, who was one of the three ACA officers who had participated in the trap which was laid for the appellant saw PW6 meeting with the appellant in front of the fingerprinting department at the Cheras Police Station. He saw them conversing with each other. Subsequently, he saw that PW6 had given the pre-arranged signal to indicate that he had handed over the marked money to the appellant ie PW6 had pulled

his shirt out from his trousers. He then saw PW6 walking away from the police station and the appellant walking into the fingerprinting department.

[62] Another ACA officer, PW1, Nor Razid bin Mohd Aripin, then introduced himself to the appellant as an ACA officer and asked the appellant to give his co-operation. The appellant pleaded with PW1 to help him. PW1 ignored the appellant's pleas and asked the appellant to take out from his pocket whatever that he had received from PW6.

[63] PW10 heard the appellant saying that he did not ask for the money. The appellant also said he merely wished to help PW6. The appellant then took out the money from his right trousers' pocket and handed it over to PW1.

[64] PW1 took the money and compared the serial numbers of the money with the numbers in the list containing the serial numbers of the marked money. He found that they were the same. He identified P2A-X as the marked money. He identified P3 as the list which contained the serial numbers of the marked money. The appellant signed on P3 after having confirmed that the serial numbers of the money which he had taken out from his pocket corresponded with the serial numbers of the marked money as contained in the list, P3.

THE ARREST OF THE APPELLANT

[65] PW1 then handed over the appellant to another ACA officer, Mohd Ahsan, who then arrested the appellant. PW1 identified the appellant as C/Insp Mazlan, the person who was named by PW6 as the police officer who had asked for RM1,600 in order to settle the report lodged by his wife, PW12, against his girlfriend, Wong Ter Kan, also known as Jia Jia.

[66] PW1 then took the appellant back to the ACA office where he prepared a list of the marked money which he had seized from the appellant.

CONFIRMATION OF THE POSITION OF THE APPELLANT AT THE MATERIAL TIME

[67] ASP Abdul Wahab bin Hj Yaacob, PW2, was the ASP in charge of service at the Department of Management at the Kuala Lumpur Police Contingent Headquarters. He was responsible for the administration and the service records of the officers, men and staff at the Kuala Lumpur Police Contingent Headquarters.

[68] Based on the appellant's service record he was able to confirm that on 21

July 1999 the appellant was attached to the Cheras Police District Headquarters and in the year 2006 the appellant was holding the position of IO at the Cheras Police District Headquarters with the rank of C/Insp.

[69] He identified P5 as the appellant's record of service.

THE TWO CHARGES AGAINST THE APPELLANT

[70] The appellant was, subsequently, charged with two counts of corruption under the Anti-Corruption Act 1997 (Act 575) (the 'Act').

[71] The first count charged him under s 10(a)(bb) of the Act, in his capacity as an agent of the Government of Malaysia, to wit, C/Insp 1/13537 Mazlan bin Osman, with the commission of the offence of corruptly soliciting for himself a gratification from PW6, to wit, a sum of RM1,600 in cash as an inducement for allegedly closing the investigation file in respect of a criminal intimidation case involving PW6's girlfriend upon PW6's wife.

[72] The offence under s 10(a)(bb) of the Act is punishable under s 16 of the Act with imprisonment for a term of not less than 14 days and not more than 20 years and a fine of not less than five times the sum or value of the gratification which is the subject matter of the offence where such gratification is capable of being valued or is of a pecuniary nature, or RM10,000, whichever is the higher.

[73] The appellant was alleged to have committed the offence on 7 July 2006 at about 11.45am at the Cheras Police District Headquarters, in the Federal Territory of Kuala Lumpur.

[74] The second count charged him under s 11(a) of the Act, in his capacity as an agent of the Government of Malaysia, to wit, C/Insp I/13537 Mazlan bin Osman, for having committed the offence of corruptly receiving for himself a gratification, to wit, a sum of RM1,200 in cash as an inducement for allegedly closing the investigation file in respect of a criminal intimidation case involving PW6's girlfriend upon PW6's wife.

[75] The offence under s 11(a) of the Act is punishable under s 16 of the Act with the same punishment as for the offence under s 10(a)(bb) of the Act.

[76] The appellant was alleged to have committed the offence on 7 July 2006 at about 7.10pm, in front of the door of the fingerprinting department of the Cheras Police District Headquarters, in the Federal Territory of Kuala Lumpur.

DECISION OF THE LEARNED TRIAL JUDGE

[77] The prosecution called 14 witnesses including the witnesses mentioned above to prove the two counts against the appellant in the sessions court. Upon the conclusion of the trial, the learned sessions court judge (the 'trial judge') found the appellant guilty, convicted him and sentenced him to the minimum 14 days imprisonment and a fine of RM10,000 for each offence. He also ordered the two sentences of imprisonment to run concurrently from the date of judgment (the 'said decision').

[78] Being dissatisfied with the said decision the appellant filed a notice of appeal to the High Court.

DECISION OF THIS COURT

[79] Having heard both the parties and considered the oral and written submissions of both the appellant and the respondent and the appeal record, this court was of the view that the appellant's appeal was without any merit. This court, consequently, dismissed his appeal and confirmed the convictions and sentences handed down by the learned trial judge.

[80] Being dissatisfied with the decision of this court the appellant has filed a notice to the Court of Appeal.

[81] This court has granted him a stay on the execution of his two sentences of imprisonment pending the outcome of his appeal to the Court of Appeal. The reason is because the appellant is a government servant and it would take some time before his appeal is heard by the Court of Appeal and it is unlikely that his appeal could be heard before the expiration of his sentences of imprisonment.

REASONS FOR THE DECISION OF THIS COURT

[82] The appellant has listed 27 reasons in his petition of appeal why his appeal ought to be allowed. Before this court the appellant has contended that his 27 reasons can be divided into five broad reasons. They are as follows:

(a) the learned trial judge failed to adequately warn himself of the danger of convicting on the uncorroborated evidence of the complainant, PW6, who is a trap witness, as the ACA officers, PW10 and PW1 are also trap witnesses and their evidence, which similarly requires corroboration, could not corroborate PW6's evidence (see *Ramli Sutu v Public Prosecutor* [1998] 5 CLJ 671);

A (b) the learned trial judge failed to consider that there was no corroboration of the sworn oral testimony of the complainant, PW6, in the form of independent evidence of some material fact which implicates the accused person and tends to confirm that he is guilty as what the other witnesses have testified are merely repetitions of what was told to them by PW6 (see
B *Ah Mee v Public Prosecutor* [1967] 1 MLJ 220; [1967] 1 LNS 3 and *Rattan Singh v Public Prosecutor* [1971] 1 MLJ 162; [1970] 1 LNS 132) and quite apart from that the complainant, PW6, is also not a credible witness;

C (c) the learned trial judge erred in admitting the tape recording of the telephone conversation, P10, as corroborative evidence of PW6's sworn oral testimony as it was not done in accordance with the correct procedure as laid down by Augustine Paul J (as he then was) in the case of *Mohd Ali Jaafar v Public Prosecutor* [1998] 4 MLJ 210; [1998] 4 CLJ Supp 208;
D

(d) the learned trial judge misdirected himself in holding that there was a prima facie case for the appellant to rebut as he failed to consider firstly, that the appellant has rebutted the presumption contained in s 42 of the Act, secondly, that the mere taking of money does not amount to taking
E a bribe if there is no intention to appropriate it as his property as was held in the case of *Ng Kok Lian & Anor v Public Prosecutor* [1983] 2 MLJ 379; [1983] CLJ (Rep) 293, thirdly, there was also no cogent evidence that the appellant requested for the money to help PW6 with his wife's report and PW6 had also testified that the appellant could not withdraw the report
F which was lodged by PW6's wife and fourthly, an adverse inference ought to be drawn against the prosecution for failing to tender the two mobile phones which were seized from the appellant by the ACA officers; and

(e) the learned trial judge failed to adequately consider the defence of the
G appellant and merely considered the appellant's sworn oral testimony without considering the sworn testimonies of his two witnesses, DW2 and DW3, his cautioned statement, D17, and the letter, D18, from DW2, who works for Maxis as the administrative officer in the Security Department, in reply to the request from the ACA for itemised bills for
H three mobile phone nos including PW6's mobile phone No 017–3487938, and the No 012–6756881 which PW6 said was the number of the appellant's mobile phone.

[83] However, this court did not agree with the appellant's contentions for
I the following reasons:

(a)

(i) in respect of the first count, this court was of the view that the complainant, PW6, was neither an accomplice nor a trap witness. He was not the active party. He merely played a passive role. He did

not offer a bribe to the appellant to induce the appellant to close the case concerning the report lodged by PW6's wife, PW12, against PW6's girlfriend, Jia Jia, for threatening to kill PW12 (the 'case') or his pending case in the court (the 'pending case'). He did not know about the case until it was brought to his knowledge by the appellant;

(ii) it was the appellant who, upon being informed by his subordinate, PW3, over the telephone had acted without authority in directing, PW3, to classify the report as 'RTM' without recording the statement of PW12, referring to and obtaining the prior approval of the SIO;

(iii) the appellant then called PW6 at the number which was given to him by PW12. He then asked PW6 to meet up with him in his office at the Cheras Police Station;

(iv) at the Cheras Police Station it was the appellant who showed the report to PW6. The appellant noted the particulars in PW6's IC and told PW6 of his pending case in the court;

(v) when PW6 asked the appellant whether the case can be settled the appellant asked PW6 for money. He initially asked for RM30,000 to settle the pending case. When PW6 told him that he had no money and that he wished to settle the case the appellant asked for RM3,000 which he reduced to RM1,600 after PW6 had told him that he had no money and that he needed to borrow the money from his friend;

(vi) PW6 did not pay any bribe to the appellant on his own accord. He went to the ACA to lodge a report. It was the ACA officer, PW11, who organised the trap to arrest the appellant after PW6 had handed over the marked money to the appellant;

(vii) in the instant case in respect of the second count PW6 was an agent provocateur rather than an accomplice because prior to the commission of the offence by the appellant he was acting as the agent for the ACA to set a trap for the appellant when he handed over the marked money to the appellant (see *Lionel De Silva v Reg* [1956] MLJ 203; [1956] 1 LNS 61 and *Pendakwa Raya lwn Zakaria bin Mansor* [1996] 1 LNS 107);

(viii) the facts of the instant case are clearly distinguishable from the facts in *Rattan Singh v Public Prosecutor*, where PW1, the complainant, was held by Syed Agil Barakbah J (as he then was) to be an accomplice in the early stages of the transaction and hence his credit was not protected under s 18 of the Prevention of Corruption Act 1961 which provided that notwithstanding any rule of law or

written law to the contrary, no witness shall, in any such trial or inquiry as is referred to in s 17, be presumed to be unworthy of credit by reason only of any payment or delivery by him or on his behalf of any gratification to the appellant gratification to the appellant who at the material time is an agent or member of a public body (see *R v Mullins* 3 Cox CC 526);

(ix) in *Rattan Singh v Public Prosecutor*, the complainant, PW1, played a more active role in the transaction apart from the bare payment during the trap set by the ACA because after concurring with the request by the appellant in that case for a bribe of $200 for the release of PW1, PW2 and one Mahadevan who had been arrested earlier for theft of rubber PW1 went to see PW2 and Mahadevan, informed them of the appellant's demand and suggested that he himself would pay $100 and PW2 and Mahadevan would raise the other $100. Both PW2 and Mahadevan agreed but PW2 made a report to the ACA and informed PW1 the next day;

(x) in the instant case PW6 cannot be regarded as an accomplice even going by his own testimony that after coming out from the appellant's room he had tried to borrow the money from his two friends, PW7 and LPS, but his two friends informed him that they did not have money and they told him to lodge a report with the ACA, and he lodged a report with the ACA and he handed over the marked money to the appellant by virtue of the provisions of s 44 of the Act;

(xi) s 44(1) of the Act expressly provides, inter alia, that notwithstanding any written law or rule of law to the contrary, no witness shall be regarded as an accomplice by reason only of such witness, having given, promised, offered or agreed to give any gratification (see para (a)(ii)); or having in any way participated in the commission of the offence or having knowledge of the commission of the offence (see para (a)(iii)); no *agent provocateur*, whether or not he is an officer of the ACA shall be presumed to be unworthy of credit by reason only of his having been engaged in a criminal conspiracy to commit such offence if the main purpose of such attempt, abetment or engagement was to secure evidence against such person participation is to obtain evidence against such person (see para (b)); and any statement, whether oral or in writing which is made to any *agent provocateur* by such person shall be admissible as evidence at his trial (see para (c) (see also the unreported case of *Public Prosecutor lwn Rahiman b Selamat & Md Razib b Othman* (Rayuan Jenayah No 42A-21 Tahun 2001));

(xii) s 44(2) of the Act also expressly provides that notwithstanding any written law or any rule of law to the contrary, a conviction for any

offence under the Act which is based solely on the uncorroborated evidence any accomplice or agent provocateur shall not be illegal and no conviction shall be set aside merely because the court which tried the case has failed to refer in the grounds of judgment the need to warn itself against the danger of convicting on such evidence;

(xiii) be that as it may, in the instant case there was corroboration of PW6's testimony in the form of independent evidence of some material fact which implicates the appellant and tends to confirm that he is guilty in the recovery of the marked money from the body of the appellant who took it out from his trousers' pocket based on the testimonies of PW1 and PW10, the two ACA officers, who approached the appellant after PW6 had given the pre-arranged signal to indicate that he had handed over the money to the appellant and PW6 had called PW1 on his mobile phone to inform him that he had handed over the marked money to the appellant;

(xiv) it was held by the Federal Court in *Thavanathan a/l Balasubramaniam v Public Prosecutor* [1997] 2 MLJ 401 that in order to be capable in law of constituting corroboration the evidence must firstly, in itself be admissible; secondly, it must come from a source independent of the evidence requiring to be corroborated; and thirdly, it must be such as to tend to show, by confirmation of some material particular, not only that the offence was committed, but also that it was committed by the accused;

(xv) in that case the Federal Court found that there was no discrepancy between the evidence of the witnesses and the contents of the search list produced concerning the sum of RM15,000 which was found on the floor beside the cabinet because the cumulative testimonies of PW4, PW5 and PW6 showed that the accused was handling the money and dropped it on the floor between the table and the steel cabinet when PW5 and PW6, who were both ACA officers and who had set the trap for the accused, rushed into the chambers;

(xvi) similarly, in the instant case the cumulative testimonies of PW1 and PW10 are admissible and they showed that the marked money was handed over to the appellant by PW6 who took it and kept it inside his trousers' pocket and when he was asked by PW1 to take out from his pocket whatever that was handed to him by PW6, the appellant took out the marked money from his trousers' pocket and handed it to PW1;

(xvii) PW1 then took the money and together with the appellant compared the serial numbers of the money with the list of serial numbers of the marked money and found that they matched each other;

(xviii) it was the appellant who had corruptly solicited the bribe of RM1,600 from PW6 for himself. The evidence of PW6 was corroborated by independent evidence adduced by his wife, PW12, concerning the report lodged by her to the police; that she had given PW6's mobile phone number to the appellant because she was afraid her husband would harass her; and the evidence of PW7 that he went to the Cheras Police Station twice with PW6 in order to settle the case concerning the report;

(xix) on the first occasion PW7 saw PW6 going inside the Cheras Police Station and upon coming out from the appellant's room, PW6 had told him that the appellant had asked for money to settle the report lodged by PW6's wife;

(xx) there were also the jottings made by the appellant in his own handwriting of PW6's mobile phone number on the police report lodged by PW6's wife and the personal particulars of PW6 when the suspect mentioned in the report was Jia Jia and not PW6 who was naturally concerned that the appellant would arrest Jia Jia and charge her for threatening his wife if he did not pay the bribe requested by the appellant although his primary intention and object of meeting up with the appellant was because the appellant told him he wished to meet up with PW6;

(xxi) when PW6 met with the appellant he asked the appellant whether the report can be withdrawn and the matter settled but PW6 did not offer a bribe to the appellant to close the case;

(xxii) so there was no necessity for the learned trial judge to warn himself of the danger of convicting the appellant without corroboration;

(xxiii) be that is it may, even assuming that there was no corroboration of PW6's evidence, as stated earlier, by virtue of s 44(2) of the Act the failure or omission of the learned trial judge to warn himself of the danger of convicting the appellant on both counts without any corroboration of PW6's evidence will not render the convictions illegal or bad if the evidence of PW6 was credible and there was sufficient evidence to prove every ingredient of the charge;

(xxiv) the court was of the view that the appellant was a trap witness and an *agent provocateur* in respect of the second count, Nevertheless, he cannot be presumed to be unworthy of credit by virtue of s 44(1)(b) of the Act as stated earlier. The same applies to the testimonies of PW1 and PW10, the two ACA officers, who were also clearly trap witnesses and had acted as agent provocateur. In *Thavanathan a/l Balasubramaniam v Public Prosecutor*, the Federal Court held that the testimonies of two ACA officers, PW5 and PW6, who were trap

witnesses and who had also acted as *agent provocateur* could corroborate the testimony of the complainant;

(xxv) be that as it may, quite apart from the corroboration of PW6's testimony in the recovery of the marked money from the appellant by PW1 and the testimonies of PW1 and PW10, as stated earlier, there was also corroborative evidence in the form of the tape recording, P10, of the mobile phone conversation between PW6 and the appellant and the transcript which clearly corroborated PW6's testimony that the appellant had asked for money earlier on the same say in order to settle the report ie RM1,600 and the appellant had expressed his willingness to accept a sum of RM1,200 from PW6 first and he had also agreed that PW6 can pay him the balance later; and

(xxvi) on top of that it is clear from the single tape recording of the mobile phone conversation between PW6 and the appellant as reflected in the transcript that the appellant did ask PW6 to hand over the RM1,200 to him at his office in the Cheras Police Station. Even though PW6 informed him of his reservations about handing over the money to the appellant in the Cheras Police Station and also that he would be arriving late because of the traffic jam, the appellant expressed time and again his willingness to wait in his office at the Cheras Police Station for the appellant to hand over the money to him.

(b) (i) Viewing the evidence as a whole in its totality the learned trial judge was correct in ruling that PW6 was a truthful witness and that his sworn testimony in respect of the two counts was credible. His testimony was consistent throughout on the important matters. His testimony was also consistent with the testimonies of the other prosecution's witnesses;

(ii) corroboration by independent evidence from an extraneous source should be distinguished from 'corroboration' appearing in s 157 of the Evidence Act 1950 which rests on the principle that consistency between a previous statement by a witness and his present evidence may afford some ground for believing him (see *Mohamed Ali v Public Prosecutor* [1962] MLJ 230; [1962] 1 LNS 99, *Ah Mee v Public Prosecutor, and Rattan Singh v Public Prosecutor*);

(iii) the learned trial judge did consider that there were some inconsistencies between PW6's testimony and PW12's testimony ie saying that he was divorced from his wife when his wife said they were only separated, in PW6's testimony ie mentioning that the appellant had initially asked for RM20,000 and then explaining later that the appellant's request for that amount of money was to

settle his own case relating to prostitution which was pending in the court, between PW6's testimony and PW7's testimony ie saying that he had tried to borrow money from his two friends to pay the RM1,600 which was asked by the appellant whereas PW7 denied this and LPS was never called as a witness but merely offered to the appellant; and

(iv) however, the learned judge was correct in concluding that they only concerned minor matters which did not affect PW6's credibility pertaining to his testimony relating to the corrupt soliciting of the RM1,600 by the appellant and the corrupt receipt of the RM1,200 by the appellant. Since the learned trial judge had decided that PW6 is a credible witness and that his testimony was corroborated by the testimonies of the other prosecution's witnesses, in particular, PW7, PW1 and PW10, it is not for this court to interfere or to disturb his finding unless there is a substantial or compelling reason (see *Lee Ah Seng v Public Prosecutor* [2007] 6 MLJ 1; [2007] 5 CLJ 1 and *Lee Kwai Heong & Anor v Public Prosecutor* [2006] 2 MLJ 528).

(c) The learned trial judge acted correctly in admitting the tape recording, P10, of the telephone conversation between PW6 and the appellant and the transcript, as PW8 had complied substantially with the accepted procedure before, during and after the recording as laid down by Augustine Paul J in the case of *Mohd Ali Jaafar v Public Prosecutor*.

(d)

(i) Based on the overwhelming evidence as adduced by the prosecution's 14 witnesses the learned trial judge was correct in ruling that the prosecution had proved a prima facie case at the close of the prosecution's case against the appellant in respect of both counts;

(ii) LPS was not a material witness because he was not present when the appellant requested PW6 for the money. He was also not present when PW6 met with the ACA officer, PW1, in order to lodge his report against the appellant or when PW6 handed over the marked money to the appellant;

(iii) no adverse inference ought to be drawn against the prosecution for its failure to tender the two mobile phones which were seized from the appellant because they did not constitute material evidence and the failure of the prosecution to tender them did not create a material gap in the unfolding of the narration of the prosecution's case; and

(iv) the case of *Ng Kok Lian & Anor v Public Prosecutor* [1983] 2 MLJ 379; [1983] CLJ (Rep) 293, which was cited by the appellant did not support the appellant's appeal as it is clearly distinguishable on

facts. In that case PW8 never asked for the bribe as the money was literally forced on him. The Federal Court held that the fact that he reported the matter to his superior officer immediately showed that he had neither mens rea nor intention to keep it as his own property and that a witness alleging that he had been given gratification by the accused is, prima facie, not an accomplice.

(e) (i) The learned trial judge had considered carefully the appellant's sworn testimony and found that the appellant's explanation did not cast a doubt on the prosecution's case. The appellant had tried to cast a doubt on the prosecution's case by saying that he did not know why PW6 had stuffed the money inside his pocket. But the testimonies of PW6, PW7, PW1 and PW10 show otherwise. In the instant case there was cogent evidence that the appellant intended to appropriate the marked money as his property. Therefore, the cases of *Ng Kok Lian & Anor v Public Prosecutor*, and *Mohd Sallehuddin bin Mohd Yusof v Pendakwa Raya* [2003] 1 LNS 687 are distinguishable on facts and do not lend support to the appellant's appeal;

(ii) there is only one irresistible inference which can be drawn by the learned trial judge from the testimonies of PW6, PW7, PW1 and PW10, taken cumulatively. It is that the appellant knew all along that PW6 was going to meet him in the Cheras Police Station to hand over to him part of a RM1,600 bribe ie RM1,200 bribe which the appellant had corruptly solicited from PW6 earlier in the day in order to induce the appellant to close the case relating to the report lodged by PW6's wife against PW6's girlfriend and to stop the appellant from issuing a warrant of arrest for PW6's girlfriend;

(iii) that explains the appellant's failure to immediately take the money out from his pocket in order to see what was stuffed inside his pocket, to report the matter to his superior and to arrange to hand the money over to his superior and also why when PW1 asked him to take out what was inside his pocket he pleaded with PW1 to help him and he also said he did not ask for the money and that he merely wanted to help;

(iv) the testimonies of the appellant's two witnesses did not assist the appellant because they did not support the appellant's testimony. DW2 testified that there were no bills issued by the service provider ie Maxis Mobile Sdn Bhd for the mobile phone nos used by PW6 and the appellant. DW3 testified that he was allowed by the appellant to use the mobile phone bearing the No 012–6756881;

(v) assuming for a moment that DW3 was speaking the truth, it did not affect the admissibility of the tape recording, P15, and the transcript of the tape recording because the appellant's name was uttered by

PW6 the moment the appellant answered the call which was made by PW6 to the mobile phone no which was pressed by PW6. The appellant said 'Hello' and PW6 said 'Hello Tuan Mazlan ha? The appellant then answered 'ya … ya … ya'. PW6 then said 'Saya Lai Kar Foo ha'. It is quite obvious from the rest of the mobile phone conversation that the mobile phone conversation was between the appellant and PW6 and that the appellant understood that the words 'one thousand two hundred' which were mentioned by PW6 referred to a part ie RM1,200 of the corrupt money ie RM1,600 which was solicited earlier by the appellant from PW6 and that it was to settle the case in order that the appellant did not carry out his threat to issue a warrant to arrest PW6's girlfriend;

(vi) it explained the reason behind the lodging of the report with the ACA by PW6 because although the appellant had told PW6 that the report could not be withdrawn the appellant had asked for money to settle the case otherwise he would issue a warrant of arrest for PW6's girlfriend thereby giving the impression to PW6 that he was in a position to settle the case in a way which was only known to the appellant himself;

(vii) the appellant's cautioned statement, D17, actually favours the prosecution's case instead of the defence's case. The reasons are as follows:

(A) D17 is a self serving and self exculpatory statement made by the appellant in order to extricate himself from his predicament. It contains the denial of the appellant that he had solicited the bribe from PW6 and also that he had received the bribe from PW6. It also attempts to explain away the events which led to his arrest by narrating important events differently from the version given by the prosecution's witnesses. It also contains admissions which reinforce the prosecution's case;

(B) in D17 the appellant confirms that the report lodged by PW6's wife concerned a domestic quarrel between PW6's Thai wife and a Chinese woman whom he suspects to be PW6's mistress whereas his superior officer, PW13, the SIO, had testified that the appellant had no authority to classify it in that manner without referring the report to him as the report also contained a threat to PW12's life;

(C) he has admitted that he was the IO on duty at the material time;

(D) he has admitted that he instructed PW3 to classify the case as RTM;

(E) he has also said that he explained very clearly to PW12 that the report was RTM but this was never put to PW12 so the truth of his allegation could not be tested and verified or at least a doubt can be cast on the prosecution's case;

(F) he has also admitted that the jottings on the report were made by him in his handwriting with a red coloured ballpoint pen;

(G) he has written down that PW12's husband is PW6, is aged 40 years old, also known as Ben, fat and tall which show that he is keeping tabs on PW6 although the suspect in the case is PW6's girlfriend;

(H) he has said that it was PW6 who had called him when the testimonies of the witnesses, namely, PW12 and PW3, which corroborate PW6's testimony that PW6 did not know anything about the report until the appellant called PW6 using the mobile number supplied by PW12;

(I) he has said that when PW6 met him at the Cheras Police Station on 7 July 2006 at about 7.30pm it was PW6 who had suddenly taken something out from his wallet and stuffed it inside his right trousers' pocket saying that it was for the appellant to 'minum teh' in Malay which is usually understood among the locals to mean a small token of appreciation given for help or assistance already rendered or to be rendered and PW6 then promptly left the police station whereas PW1 and PW10 said they saw PW6 and the appellant speaking to each other for a short while before they saw PW6 giving the pre-arranged signal and PW1 received a call from PW6 and only then did they move in to confront and arrest the appellant;

(J) he admitted that he had taken out the marked money from his pocket, handed it over to an ACA officer and verified the serial nos of the marked money with the numbers in a form and signing three copies of the form; and

(K) he admitted that he had handed over to the ACA officer nine items which belonged to him and that he had signed three copies of the list which has listed out the nine items.

(viii) The learned trial judge had rejected the appellant's defence as an afterthought after having carefully considered it. It was clear to this court that having considered the probabilities of the defence this court agreed with the learned trial judge that the appellant had failed to discharge the burden of disproving and rebutting the

presumption against him (see *Hamidon bin Mat Yatim v Public Prosecutor* [1995] MLJU 112; [1995] 3 CLJ 724);

(ix) this court was of the view that the explanation of the appellant was not consistent with his innocence. It was also not plausible, inherently probable or likely and it was inherently incredible. If he had not done anything wrong he would not have pleaded with PW1 to help him when PW1 confronted him after PW6 had handed over the marked money to him;

(x) by virtue of s 45 of the Act his statement to PW1 is admissible as evidence against him to show that his defence that it was PW6 who literally forced the money on him without any request by him is not genuine, not true, might not reasonably be true, most likely not true and was most probably an afterthought;

(xi) this court was not convinced that the appellant's convictions were wrong, were against the weight of the evidence or that they could not be supported by the evidence which was adduced by the prosecution;

(xii) consequently, this court was of the view that the learned trial judge was correct when he held that the prosecution had proved the two counts against the appellant beyond reasonable doubt as the appellant did not succeed in rebutting the presumption as contained in s 42 of the Act on the balance of probabilities that he had solicited the gratification of RM1,600 corruptly and that he had also received the gratification of RM1,200 corruptly (see *Public Prosecutor v Yuvaraj* [1969] 2 MLJ 89).

CONCLUSION

[84] In the premises this court was satisfied that there was no substantial or compelling reason for the court to disturb the findings of primary facts and the reasonable inferences which the learned trial judge had drawn from them. This court was of the view that the learned trial judge was correct in coming to his conclusion that the appellant was guilty on both counts and in convicting him for the two offences of corruption.

[85] This court was of the view that the sentences were on the lenient side.

[86] Nevertheless, it is an established principle of law that an appellate court should be slow to interfere with or disturb a sentence passed by the court below unless it is manifestly wrong in the sense of being illegal or of being unsuitable to the proved facts and circumstances of the case. Since the learned trial judge

has applied the correct principles in the assessment of sentence there is no reason for this court to interfere by passing a different sentence (see *Public Prosecutor v Mohamed Nor & Ors* [1985] 2 MLJ 200).

[87] The learned trial judge had imposed the sentences in accordance with the law after taking into account the minimum and maximum sentence set out in s 16 of the Act, the established principles of sentencing, in particular, deterrence and prevention, the public interest being the prime consideration (see *Public Prosecutor v Loo Choon Fatt* [1976] 2 MLJ 256), the gravity of the two corruption offences committed by the appellant, the hardship suffered by the appellant who had been interdicted from service (see *Public Prosecutor v Francis Philip Nunis* [1982] CLJ (Rep) 648), the remarks and comments of the Federal Court in *Public Prosecutor v Dato' Waad Mansor* [2005] 2 MLJ 101; [2005] 1 CLJ 421 and the High Court in *Public Prosecutor v Mohamed Fathi bin Haji Ahmad* [1979] 2 MLJ 75 relating to the object of sentencing in corruption cases and the clarion call by the court in the two cases that the sentences imposed for offences of corruption should be deterrent in nature so as to reflect the gravity of the offences and to deter like minded people from committing such offences.

[88] This court, therefore, dismissed his appeal and upheld his convictions and the sentence of 14 days imprisonment for each offence and the fine of RM10,000 in default three months imprisonment for each offence.

Appeal dismissed and convictions and sentences confirmed.

Reported by Kanesh Sundrum